Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1980

No. 79-1096

JUDITH LEIGH PEARSON, Petitioner,

v.

STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Stephen E. van Gaasbeck
LYTLE & VAN GAASBECK
1227 S. W. Military Dr.
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January 9, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1980

No.

JUDITH LEIGH PEARSON, Petitioner,
v.
STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

The petitioner Judith L. Pearson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered on October 17, 1979.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals and the opinion dissenting to the denial of the petitioner's Motion for Rehearing can be found at 587 S.W.2d 393 and in the appendix.

JURISDICTION

The opinion of the Texas Court of Criminal Appeals was entered on October

17, 1979 when on that date the petitioner's tiemly filed Motion for Rehearing was denied. This court's jurisdiction is envoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the warrantless "murder scene" search of the petitioner's apartment was unconstitutional even though it occurred prior to this court's decision in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408.

2. Whether handwriting samples taken pursuant to an unconstitutional arrest made for the purpose of gathering evidence should be excluded from use in trial.

STATEMENT OF THE CASE

On April 9, 1976 at 6:30 p.m. Houston Police officers and investigators were called to the petitoner's apartment by the management of the apartment complex where petitioner resided with her three year old daughter Tamara. The call reported a dead body in the petitioner's residence and when they arrived at the scene the security guard let them into the apartment where they observed several persons comforting the petitioner who was crying. They were taken to Tamara's bedroom by the security guard where they found her dead, lying in bed. A note was pinned to her blouse stating "I'm sorry I had to kill such a beutal (sic) little girl in or to (sic) teach you a lesson. Next time it will be you". She was strangled to death.

The officers conducted an immediate search of the entire apartment

(kitchen, two bedrooms, and living room) for evidence (not to determine the presence of additional victims). They had no search warrant, nor did they obtain the petitioner's consent. In the living room they found a folder with several notebooks inside. They took out the notebooks, opened them and read their contents. One notebook contained a story in the petitioner's handwriting. The story described an incident which involved a threat to the petitioner's daughter that occurred two years prior to her actual death. The story was written while the petitioner lived in Georgia. The facts of the story (which was intended for publication) were strikingly similar to the actual killing of Tamara.

The petitoner was arrested at 9:00 p.m. that night and taken to the Houston Police Department. The purpose of this arrest was to obtain her statement (R 239,282). After obtaining her statement the police continued to hold her in the city jail, questioning her for four days (R 282) taking finger prints and handwriting samples and searching her a-

partment (without a warrant). On her fourth day of detention, handwriting samples were taken from her (after giving her the Miranda warnings). It was only then that she was taken before a magistrate (R 320,322). During these four days she was allowed to see only a minister (once) and a friend (once) (R 323).

The petitoner filed a motion to supress the seized notebook citing the unconstitutional nature of the search and seizure as ground for exclusion. This motion was denied by the trial court.

During trial on January 24, 1977 the same objection was raised and overruled. Her motion for new trial cited the failure to exclude the story as a ground for new trial. The motion was denied. The unconstitutional search and seizure of the story was timely raised on appeal to the Texas Court of Criminal Appeals.

The Court of Criminal Appeals in it's opinion of June 21, 1978 agreed that the search was illegal according to Mincey v. Arizona, 437 U.S. 385,

98 S.Ct. 2408, but constured U.S. v. Peltier, 422 U.S. 531, 95 S.Ct. 2313 (1975) to mean that Mincey should not be applied retroactively and affirmed the trial court's judgment. Petitioner filed a timely Motion for Rehearing which was denied.

During trial the petitoner objected to the admission of the handwriting samples on the grounds that they were the fruits of an unconstitutional arrest. The trial court ignored the Fourth Amendment grounds, overruling the objection stating that the taking of handwriting samples did not violate Fifth Amendment guarantees.

REASONS FOR GRANTING WRIT

I. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT.

(A) Regarding the unconstitutional search of the petitoner's apartment this court ruled in Mincey that the "murder scene exception" to the search warrant requirement created by the Arizona Supreme Court was not a valid exception and therefore searches relying on it were unconstitutional.

In 1971 the Tex. Ct. Cr. App. created a murder scene exception identical to Arizona's in Brown v. State, 475 S.W.2d 938 (1971).

In it's opinion in the petitoner's appeal the Tex. Ct. Cr. App. held that Mincey did not apply to her case stating "We hold that because the search and trial in this case occurred before the decision in Mincey v. Arizona, supra, when Brown v. State, supra, was still good law, the disposition of the appellant's first ground of error is controlled by Brown instead of Mincey." The Tex. Ct. Cr. App. cited Peltier as authority for this reasoning.

The Tex. Ct. Cr. App.'s opinion conflicts directly with several of this court's opinions by stating that Brown was "good law" at the time of the petitioner's trial.

(1) It conflicts with the Mincey opinion in which this court specifically stated that none of the arguments in favor of the "murder scene" rule persuades us of the validity of the genric exceptions delineated by the Arizona Supreme Court."

(2) It conflicts with this court's opinion in Chimel v. California, 395 U.S. 752, 985 S.Ct 2034 (1969) which held that the scope of a search under an exception to the search warrant requirement must be stricly limited to the circumstances which rendered the search permissable. Since Brown purported to allow a full evidentry search of a residence at the discovery of a dead body, it was in conflict with Chimel and therfore it was not even "good law" at the time of its creation.

(3) In holding that the denial of retroactive effect of Mincey is justified by Peltier, the Tex. Ct.Cr. App. is in direct conflict with Peltier itself.

This court's opinion in Peltier specifically limits its application to cases which "have broadened the exclusionary rule." Mincey did not enlarge defendant's constitutional rights nor did it broaden the exclusionary rule. It is the petitioner's position, supported by Mincey, that the search of her apartment was unconstitutional

even if the Mincey opinion had not been handed down.

The Tex. Ct. Cr. App. construes Peltier as creating a "good faith rule" allowing unconstitutionally seized evidence to be admitted if the searching officers were relying in good faith upon the state of the law at the time of the search.

Actually Peltier dealt with evidence seized in a type of search which had been permitted for years; had consistently withstood judicial challenges; was sanctioned by legislation and; provided for by adminsitrative regulations. The search in the petitoner's case was not sanctioned by legislation or adminisrative regulations and the only court decisions permitting it were in direct conflict with the opinions of this court. Therefore, for the searching officers to have been "relying in good faith" to Brown they had to be in bad faith in respect to Chimel, supra: Coolidge v. New Hampshire 403 U.S. 443, 91 S.Ct 2022 (1971) and Katz v. United States 389 U.S. 347, 88 S.Ct. 507.

(4) Texas is continuing to erroneously apply Peltier and will do so until stopped by this court. See Kemner v. State, cause no. 55,786 (11/79) and NASTU v. State, cause no. 58,059 (10/79) both of which are not published as of now.

(B) In respect to the admission of the handwriting samples, the Tex. Ct. Cr. App.'s opinion is in direct conflict with this court's holding in Davis v. Mississippi, 394 U.S. 721 (1969) and Brown v. Illinois, 422 U.S. 590 (1975).

In Davis this court held that finger prints taken as a result of an unconstitutional arrest were to be excluded from evidence as a fruit of that arrest.

In Brown v. Illinois this court held that a confession taken as a result of an unconstitutional arrest is to be excluded as a fruit of that arrest.

The Brown opinion listed several tests to determine a casual connection between the arrest and the taking of evidence:

(1) The absence of intervening circumstances - In the petitioner's case

the only intervening circumstance was the giving of the Miranda warning which alone is insufficient, Brown v. Illinois, supra.

(2) The flagrancy of the illegal arrest - In the petitioner's case the illegality was flagrant. She was taken to the police station without a warrant or exigent circumstances, no attempt was made to obtain a warrant, she was held for four days before being brought downstairs and charged befor a magistrate, she was allowed only two visits during that period of time.

(3) The purpose of the illegal detention - In the petitioner's case the purpose was to gather evidence. The prosecutor stated during the hearing of the petitioner's objection to the handwriting evidence that "as far as the arrest goes, the evidence is that she was taken from the scene to be questioned and as the circumstances became known she remained in custody" (R 320).

Further, the police did not take her to a magistrate until the moment after they convinced her to give the

handwriting samples.

II. THE OPINION OF THE TEX. CT. CR. APP. TOTALLY IGNORED THE PETITIONER"S ASSERTION OF HER FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE ARREST, SEARCH AND SEIZURE.

Through out the entire legal process of the trial and appeal of her case the petitioner has asserted that the evidence was taken in violation of her Fourth Amendment rights. The trial court and Tex. Ct. Cr. App. have totally ignored the petitioner's assertion of this right and instead have treated her objection as an assertion of the Fifth Amendment. To allow to stand is to effectively deny the petitioner the protection of the Fourth Amendment which she had repeatedly asked to be enforced. The reported opinion in the petitioner's case will serve as additinal precedent for the continued admission of handwriting samples and fingerprints taken direclty as a result of unconstitutional arrests.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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January 9, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this ____day of January, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Mr. Carol Vance, District Attorney, Harris County Courthouse, Houston, Texas 77002
I further certify that all parties required to be served have been served.

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APPENDIX

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

JUDITH LEIGH PEARSON, Appellant
No. 58,055 vs. ---Appeal from
HARRIS County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for murder; punishment was assessed by the court at life.

The sufficiency of the evidence is not challenged. Although three grounds of error are asserted in the brief, the second was abandoned at oral argument, leaving two issues for consideration in this appeal.

In her first ground of error appellant contends the trial court erroneously admitted papers and writings seized during a search of the homicide scene. As pointed out in her supplemental brief, this search and seizure were in violation of the principle announced in Mincey v. Arizona, _____U.S._____, 98 S.Ct. 2408, 57 L.Ed.2d 290 (197 8). The search was conducted on April 9, 1976, and the trial in this case was in January of 1977. Thus both the search and trial were conducted prior to the decision

in Mincey v. Arizona, supra. At that time the common law "exigency rule" allowed such homicide scene investigations. Brown v. State, 475 S.W.2d 938, 948-950. We are therefore confronted with the question of the retroactive effect of Mincey.

In United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), the court discussed the retroactivity of exclusionary rule cases from the perspectives of both the imperative of judicial integrity and the deterrence rationale:

"Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases '(w)here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, 'Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1142, 28 L.Ed.2d 388 (1971), the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); Stovall v. Denno, supra; Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969); Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969); Williams v. United States, supra, Hill v. California. 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971).

"We think that these cases tell

us a great deal about the nature of the exclusionary rule, as well as something about the nature of retroactivity anaysis. Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to 'the imperative of judicial integrity.' Elkins v.United States, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960), although the Court has relied principally upon the deterrent purpose served by the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Lee v. Florida, 392 U.S. 378, 88 S.Ct 2096, 20 L.Ed.2d, 1166 (1968), See also United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974). And see also Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 668=672 (1970).

"When it came time to consider whether those decisions would be applied retroactively, however, the Court recognized that the introduction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold.' Elkins v. United States, supra, 364 U.S., at 223, 80 S.Ct. at 1447. Thus, while the 'imperative of judicial integrity' played a role in this Court's decision to overrule Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), see Mapp v. Ohio, supra, 367 U.S., at 659, 81 S.Ct. at 1693, the Mapp decision was not applied retroactively: 'Rather than being abhorrent at the time of seizure in this case, the use in state trials of illegally seized evidence had been specifically authorized by this Court in Wolf.' Linkletter v. Walker, supra, 381 U.S., at 638, 85 S.Ct., at 1742 (footnote ommitted). Similarly, in Lee v. Florida, supra, this Court overruled Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952), and held that evidence seized in violation of Sec. 605 of the

Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. Sec. 605, by state officers could not be introduced into evidence at state criminal trials:

"' (T)he decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the "imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222, (80 S.Ct. 1437, 1446 4 L.Ed.2d 1669). Under our Constitution no court, state or federal, may serve as an acoomplice in the willful transgression of "the Laws of the United State," laws by which "the Judges in every state (are) bound . . ."'
392 U.S., at 385-386, 88 S.Ct. at 2101 (footnotes ommitted).

"But when it came time to consider the retroactivity of Lee, the Court held that it would not be applied retroactively, saying:
"'Retroactive application of Lee would overturn every state conviction obtained in good-faith reliance of Schwartz. Since this result is not required by the principle upon which Lee was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.' Fuller v. Alaska, supra, 393 U.S., at 81, 89 S.Ct. at 62.

"The teaching of these retroactivity cases is that if the law enforcement officers reasonable believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow a fortiori from the Linkletter and Fuller holdings that the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged

in by the law enforcement officials is not permitted by the Constitution. For, although the police in Linkletter and Fuller could not have been expected to foresee the application of the exclusionary rule to state criminal trials, they could reasonably have entertained no similar doubts as to the illegality of their conduct. See Wolf v. Colorado, 338 U.S., at 27, 69 S.Ct. at 1361; Sec. 605 of the Federal Communications Act of 1934; cf. Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937).

"This approach to the 'imperative of judicial integrity' does not differ markedly from the analysis the Court has utilized in determinging whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines . See Linkletter v. Walker, supra, 381 U.S., at 636=637, 85 S.Ct., at 1741-1742; Fuller v. Alaska, supra, 393 U.S., at 81, 89 S.Ct., at 62; Desist v. United States, supra, 394 U.S. at 249-251, 89 S.Ct., at 1033-1035. In Desist, the Court explicitly recognized the interrelation between retroactivity rulings and the exclusionary rule; '(W)e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.' 394 U.S., at 254-n. 24, 89 S.Ct., at 1036.

"This focus in the retroactivity cases on the purposes served by the exclusionary rule is also quite in harmony with the approach taken generally to the exclsuionary rule. In United States v. Calandra, 414 U.S., at 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561, we said that the exclusionary rule 'is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' It follows that 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' Ibid. We likewise observed in Michigan v. Tucker, 417 U.S., at 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182:

"'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.'"

We hold that because the search and trial in this case occurred before the decision in Mincey v. Arizona, supra, when Brown v. State, supra, was still good law, the disposition of appellant's first ground of error is controlled by Brown instead of Mincey. The ground of error is overruled.

In the other ground of error presented by appellant, she contends that handwriting samples taken from her and used as evidence in the case were the product of an illegal arrest. She argues the arrest was illegal because she was not taken before a magistrate until four days after her arrest and after the handwriting samples were taken. We note that handwriting samples do not violate the privilege against self-incimination, Olson v. State, 484 S.W.2d 756, and that no casual connection between the failure to take her before a magistrate and the taking of the handwriting samples was shown. Hester v. State, 544 S.W. 2d 129. 134-135.

The ground of error is overruled.

The judgment is affirmed.

ODOM, Judge

(Delivered July 3, 1979)
By: Panel 3, 2nd Quarter, 1979, composed of

Wendell A. Odem, Judge
W.T. Phillips, Judge
W.C. Davis, Judge

JUDITH LEIGH PEARSON, Appellant
No. 58,055 vs. ---Appeal from
HARRIS County
THE STATE OF TEXAS, Appellee

DISSENTING OPINION ON THE DENIAL OF APPELLANT'S MOTION FOR REHEARING EN BANC

I cannot agree that Mincey v. Arizona, _____U.S._____,98 S.Ct. 2408, 57 L.Ed.2d (1978), is not retroactive. The Supreme Court in Mincey did nothing more than apply well-established Fourth Amendment law. The opinion in Mincey, 98 S.Ct. at 2412-2413, states:

> . . . The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576; also South Dakota v. Opperman, 428 U.S. 364, 381, 96 S.Ct. 3092, 3103, 49 L.Ed.2d 1000 (POWELL, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564; Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409; Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889; Trupiano v. United States, 334, U.S. 669, 705, 68 S.Ct. 1229, 1232, 92 L.Ed. 1663. The Arizona Supreme Court did not hold that the search of the petitoner's apartment fell within any of the exceptions to the warrant requirement previously recognized by this Court, but rather that the search of a homicide scene should be recognized as an additional exception.

Several reasons are advanced by the State to meet its "burden . . . to show the existence of such an exceptional situation" as to justify creating a new exception to the warrant requirement. See Vale v. Louisiana, supra, 399 U.S., at 34, 90 S.Ct., at 1971, Jeffers v. United States, 343 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59. None of these reasons, however,

persuades us of the validity of the generic exception delineated by the Arizona Supreme Court.

. . . , we hold that the "murder scene exception" created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.[9] (footnote omitted)

Mincey did not announce any new rule of law, or represent a "sharp break in the web of the law." See United States v. Hart, 546 F.2d 798 (9th Cir. 1976). What Mincey did was mend a break in the law caused by a number of cases which gradually evolved into the so-called "murder scene exception" to the warrant requirement. As pointed out in Mincey, this is not and never has been a valid exception to the warrant requirement. It appears tohave evolved from cases which held that a warrantless entry into a home was justified in the event the police had reason to believe that a person was dying or otherwise in need of immediate aid. See United States v. Barone, 330 F.2d 543 (1964);Wayne v. United States, 318 F.2d 205 (1963). This is a recognized exception to the warrant requirement. See Mincey, 98 S.Ct. at 2413-2414. Once inside, the officers may seize incriminating evidence that is in plain view, or inspect the premises to make sure that all danger has passed and the situation is under contol, as these are also recognized exceptions. See Mincey, 98 S.Ct. at 2414. But a general search of the premises for incriminating evidence, after the emergency has subsided, is not and has never been justifiable.

The majority states that at the time of the search in this case the "common law ' exigency rule' allowed such homicide scene investigations,' citing Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971). To the extent that Brown and its isolated companions Tocher v. State. 501 S.W.2d 921 (Tex. Crim. App. 1973), and Corbett v. State, 493 S.W.2d 940 (Tex. Crim. App. 1973),

authorized searches under the "murder scene exception," they were not based on precedent and were clearly contrary to established Fourth Amendment law. It is reasonable to assume that a lawyer familiar with search and seizure law would have recognized these cases as a substantial departure from established law, and could have advised interested parties that these cases represented unsound authority.

I see no reason to retroactively apply such sparse case law that has been open to serious question since its inception. I would hold that since Mincey simply applied existing search and seizure law and stated nothing that we did not know already, it should be applied retroactively. Compare United States v. Hart, supra; United States v. Martinez, 526 F.2d 954 (1976).

United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), does not require a different result. The 9th Circuit Court of Appeals had held in Peltier that the decision in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 7 L.Ed.2d 596 (1973), holding a warrantless border search of an automobile unconstitutional, was to be applied retroactively because the decision overruled not prior Supreme Court decision and reaffirmed established law. In reversing the Ninth Circuit in Peltier, the Supreme Court noted that border searches of the type struck down by Almeida-Sanchez had been upheld by the courts for 20 years. and that the border patrol agents were acting under the express authority of a statute and long-standing administrative regultations. It concluded from this that the officer's conduct in performing the searches and seizures was not "blameworthy." The case law on the "murder scene exception" is sparse, of dubious origin, without statutory approval, and has been openly contrary to established Fourth Amendment law from the beginning. The conduct of the officers in this case cannot be labeled blameless.

Finally, although the Court in Peltier engaged in a general discussion of the retroactivity of exclusionary

rule cases, Peltier did not establish per se rule that cases which extend the scope of the excluiionary rule should not be applied retroactively. To accept it as such would be to adopt just the "mechanical approach" to the issue of retroactivity that the Court in Peltier repudiated.

I dissent to the denial of appellant's motion for rehearing.

PHILLIPS, Judge

(Delivered October 17, 1979)
En Banc

Supreme Court, U. S.
FILED
MAR 26 1980
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

NO. 79-1096

JUDITH LEIGH PEARSON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

NO. 79-1096

JUDITH LEIGH PEARSON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Judith Leigh Pearson v. State of Texas*,

587 S.W.2d 393 (Tex.Crim.App. 1979), and is reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WHETHER THE SEARCH IN WHICH EVIDENCE WAS SEIZED IN PETITIONER'S APARTMENT ON APRIL 9, 1976, WAS JUSTIFIED BY THE INITIAL INTRUSION THAT BROUGHT THE POLICE OFFICERS TO THE PREMISES?

II. WHETHER *MINCEY V. ARIZONA*, 437 U.S. 385 (1978), SHOULD BE APPLIED RETROACTIVELY ON THE FACTS OF THIS CASE?

III. WHETHER THE HANDWRITING SAMPLES INTRODUCED IN EVIDENCE IN THIS CASE SHOULD HAVE BEEN EXCLUDED AS THE PRODUCT OF AN ILLEGAL ARREST?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Texas Code of Criminal Procedure Article 14.03 provides:

> Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

STATEMENT OF THE CASE

At 6:00 p.m. on April 9, 1976, Petitioner told a neighbor at the apartment complex to call security. When security was contacted, it was discovered that Petitioner had already telephoned security. Although the record is unclear as to who called, the Houston Police Department was summoned to Petitioner's apartment at around 6:45 p.m. to investigate a death. Three officers arrived at the scene, where they were escorted by Petitioner's neighbor who was a former security guard at the apartment complex, to Petitioner's daughter's bedroom. There they found Tamara, the three year old child, dead. The officers noticed that Tamara had a half-torn piece of notebook paper pinned on her blouse.

On it was a note written with a red pen. Because of the note's contents and the presence of a bruise on the child's neck, the officers suspected Tamara had been murdered.

The officers proceeded to examine the items in the bedroom. They detected no signs of a break-in. On top of a chest of drawers, however, they did find and seize the instrument that was used to strangle the victim. There is no evidence on the record that they opened any drawers or searched closed areas in the bedroom.

Thereafter, the officers were informed by the Petitioner that she did not know who "could have done such a thing" but suspected that it might have been a burglar. However, the officers testified that there was no evidence of a forcible entry. One officer was informed by a couple present at the scene that Petitioner had a "do not disturb" sign on her front door that afternoon. A female officer testified that when Petitioner was asked about the note, she said she could not remember what happened to it, but she may have thrown it away. Further, the officer testified that Petitioner gave another officer instructions as to where the note might be and permission to look for the note. The two male officers went through the kitchen to reach the back door and search for the note in a garbage can; but it was dark and they did not find the note.

The only other evidence that was seized that evening was a blue canvas binder which contained papers and notebooks, located on top of a T.V. tray in the living room. One officer testified that he picked up the binder because he wanted to see whether it contained the missing half piece of notebook paper. Besides the paper and notebooks inside the folder, the officer found a pen; however, he did not find the missing piece of paper. Contrary to Petitioner's statement in her petition, there is no testimony in the record that the officer read the contents of any of the materials found in the binder.

The record also does not reflect that any other search was conducted that evening.

Petitioner was requested to accompany the officers to the police station to answer some questions. She voluntarily agreed to go with the officers, and there is no evidence in the record that, at the time, she was under arrest or under suspicion of having committed a crime. The next morning, two police officers were instructed to go to Petitioner's apartment and find a note that said "do not disturb". One of the witnesses, an officer, who testified was asked the following question by the prosecutor: "your supervisor, do you recall or if you did, have this defendant [*sic*] instructions as to where the note might be found and permission to go look for it?" "Yes, Sir. She told us it was in her housecoat pocket in her bedroom." The officers arrived at the apartment between 9:00 a.m. and 10:00 a.m. They did not find the note in Petitioner's housecoat pocket; however, they located the note in the trash container on Petitioner's back porch. After this morning search, there is no evidence that the officers ever returned to Petitioner's apartment.

The record does not indicate the time at which Petitioner was placed under arrest; however, the State prosecutor stated during the trial that she was under arrest only when all incriminating circumstances were discovered. The record does reflect that on the fourth day of her detention, she was before a magistrate. Prior to this and on the same day, she had agreed to provide handwriting samples to an officer. There is no evidence in the record that she was questioned during her four day stay. Nor is there evidence that she was not allowed to visit with her family. Instead, the record reflects that a State witness testified that he observed Petitioner visiting with a minister and a friend but he did not know whether she visited with anyone else.

At Petitioner's trial, defense counsel objected to the

admission of the notebook and its contents as well as the handwriting samples on Fourth Amendment grounds. The trial court overruled his objections, and the items were admitted into evidence. Petitioner did not object to the "do not disturb" note when it was offered and later admitted into evidence.

The Texas Court of Criminal Appeals affirmed the conviction principally on the grounds that *Mincey* was not retroactive. In doing so, it merely accepted in one sentence and without any analysis whatsoever, Petitioner's argument that the search and seizure would otherwise have been in violation of the Fourth Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE TRIAL COURT CORRECTLY ADMITTED INTO EVIDENCE THE NOTEBOOK AND ITS CONTENTS DURING PETITIONER'S TRIAL.

A. The Police Officers Properly Seized the Evidentiary Items in Plain View Where Their Presence on the Premises was Pursuant to a Report of a Dead Person at Petitioner's Apartment.

Petitioner, on direct appeal to the Texas Court of Criminal Appeals, only contended that the state trial court had erred in admitting into evidence the binder and its contents (listed as exhibits 1, 3, 4, and 16) over Petitioner's objection, since the items were the product of an illegal search.[1] The only other ground for review

[1]These specific evidentiary items are (1) State Exhibit No. 1, a handwritten story entitled "My Perpetual Nightmare" found inside the blue binder on top of a T.V. tray in Petitioner's living room; (2) State Exhibit No. 3, a blue canvas three-ring binder with five hole lined papers inside, some with writing; (3) State Exhibit No. 4, a yellow notebook with three hole lined looseleaf paper with nine typed pages, found inside the same binder; and (4) State Exhibit No. 16, one white Bic pen with red ink, found inside the same binder.

before the Texas Court of Criminal Appeals was that the handwriting samples also should have been excluded at the trial since those samples were the product of an illegal arrest. Respondent notes that his response is limited to the grounds raised and considered in the Texas State Courts. In reply to Petitioner's first ground, there is no question that the police officers were called to the scene of the crime to investigate the victim's death. Thus, they rightfully gained access to enter Petitioner's apartment to investigate the report of a dead body on the premises, and it was not necessary for the officers to obtain a warrant before entering Petitioner's apartment. *Cf. Mincey v. Arizona*, at 393. The issue in dispute is whether the ensuing seizure of the binder and its contents was justified. Petitioner contends that the items seized in the living room were the products of an illegal search.

This Court has held in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that where the initial intrusion that brings the police within the plain view of the item "is supported, not by warrant, but by one of the recognized exceptions to the warrant requirement," then the seizure is legitimate. *Id.* at 465. In this case, the officer was not searching for incriminating evidence against the Petitioner, but was only looking for the other half piece of paper. The binder was on top of a T.V. tray; and, thus, was in plain view of the officer. It is irrelevant that the binder was later discovered to contain evidence that was incriminating against the Petitioner. *Id.* at 466.

The evidence seized was obtained within the limits of the plain view doctrine. First, one of the limitations is that plain view of the article is alone not sufficient to

justify its warrantless seizure absent exigent circumstances. Here, this criterion is met, since the officers were called to the scene of a crime where a dead body was present. In such a situation, even under *Mincey*, the seizure of items in plain view is permissible. U.S. at 393. Second, discovery of the evidence in plain view must be inadvertent. To meet this requirement, the police officers must not anticipate the discovery of the evidence. Clearly, this was not the case when the items were seized. Thus, the search was reasonable since in the officer's belief he was seizing items in plain view that might be tied to the criminal activity. *See, Michigan v. Tyler*, 436 U.S. 499 (1978). Further, the record reflects that when the officer opened the binder, it contained papers that had the same line ruling as the note on the victim. Based on these facts it was not necessary to procure a search warrant, and the search was valid under the plain view doctrine.

B. The Search Conducted by the Police Officers was Reasonable and Probably Consented to by the Petitioner.

As this Court has previously held, the relevant test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Coolidge v. New Hampshire, supra* at 2042. The question of whether the search is reasonable depends upon "the facts and circumstances — the total atmosphere of the case, . . . those facts and circumstances must be viewed in light of the established Fourth Amendment principles . . ." *Chimel v. California*, 395 U.S. 752, 765 (1969). The Fourth Amendment explicitly states that it only prohibits unreasonable searches.

The facts in this case fail to support any proposition that the search was unreasonable. First, the officers did not conduct an exhaustive and intrusive search, as was the case in *Mincey*. The search did not last four days, but only continued to the next day since the officers had been hindered by darkness when looking for the "do not disturb" note. Moreover, it appears from one of the officers' testimony at trial that the search on April 10 was consented to by Petitioner. Further, the officers did not open drawers, closets and cupboards and inspect their contents. There is no evidence that every item in the apartment was closely examined or that the complete apartment was cursorily examined. In fact, the testimony indicates that any search conducted was called for by the surrounding circumstances. For example, the officers examined the windows and doors in the apartment for evidence of a forcible entry. They testified that there was none. Also, the officers looked inside some trash located outside of the apartment only after being told by Petitioner that she might have thrown away the "do not disturb" note. The only items seized that evening were in plain view. In sum, the record does not reflect that the search was unreasonable and indicates consent by Petitioner.[2]

II.

MINCEY V. ARIZONA SHOULD NOT BE APPLIED RETROACTIVELY BASED ON THE FACTS OF THIS CASE.

In *Williams v. United States*, 401 U.S. 645, 651 (1974), this Court stated: "we have held . . . that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights." *Id.* at 651. With this in mind, this Court has, however, provided some guideline with regard to retroactive application of constitutional rules

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[2]Research has disclosed no case by a court that has directly addressed the issue whether *Mincey v. Arizona* should be applied retroactively. Therefore, it appears to be too early in the development of the *Mincey* jurisprudence for this Court to address its retroactivity.

in criminal cases. In *United States v. Peltier*, 422 U.S. 531, 535 (1975), this Court discussed the question of when a ruling in criminal case should be given retroactive effect:

> In those cases "[w]here the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of the guilty verdicts in the past trials," . . . the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact-finding process, the Court has concluded that any such new constitutional principle would be accorded only perspective application. . . .
>
> [Also, this Court has] recognized that the introduction of evidence which has been seized by law enforcement officials in good faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of the Constitution they are sworn to uphold." . . .
>
> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that the evidence they had seized was admissible at trial, the "imperative of the judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

Id. at 535-536.

Under *Peltier*, three issues should be considered: (1) Did the evidentiary items that were seized relate to the integrity of the fact-finding process; (2) when the items were seized, were the law enforcement officers complying in good faith with the then prevailing constitutional standards; and (3) was the ruling in the criminal case a new constitutional principle.

First, the items in issue that were seized were solely physical evidence. Without doubt, this type of evidence does not raise any serious question as to the accuracy of the guilty verdict since the note and papers were reliable. Therefore, the items admitted into evidence did not raise any question as to the actual truth-finding process of Petitioner's trial. The first criterion is satisfied.

Second, as the Texas Court of Criminal Appeals held, when the search was conducted and the trial was held, Texas courts allowed homicide scene investigations. *See, Allen v. State*, 536 S.W.2d 364 (Tex.Crim.App. 1976); *Tocher v. State*, 501 S.W.2d 921 (Tex.Crim.App. 1973); *Brown v. State*, 475 S.W.2d 938, 948-50 (Tex. Crim.App. 1971); *Parsons v. State*, 271 S.W.2d 643 (Tex.Crim.App. 1954). Therefore, in and prior to 1976, the Texas courts recognized what has been called a "murder scene exception" rule that permitted a warrantless search of an area where a homicide had occurred.

Besides Texas, other states have recognized this rule as being consistent with the Fourth and Fourteenth Amendments. *See, e.g., People v. Wallace*, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); *Lonquest v. State*, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972); *State v. Oakes*, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971); *State v. Chapman*, 250 A.2d 203 (Me. 1969); *Stevens v. State*, 443 P.2d 600 (Alaska 1968),

cert. denied, 393 U.S. 1039 (1969).

Therefore, the Texas Court of Criminal Appeals properly held that since the search and the trial occurred before the decision in *Mincey*, *Brown v. State* was still good law. It follows that the police officers acted in good faith under existing Texas law when they seized the items at Petitioner's apartment, and the trial court was applying existent case law when it admitted the items into evidence.

The last question to consider is whether the Supreme Court enunciated a new principle in *Mincey v. Arizona*. Without dispute, prior decisions by this Court recognized warrantless searches in "emergency situations" or "exigent circumstances."[3] What constitutes "exigent circumstances" or emergency situations has never been clearly defined by this Court. Instead, this Court delineates the exceptions on a case by case basis. As Mr. Justice Stewart noted in the majority opinion in *Coolidge v. New Hampshire*, *supra*:

> With respect to searches and seizures carried out on a suspect's premise, the conflict has been over the question of what qualifies as an "exigent circumstance." It might appear that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his "person *** papers, and effects," without prior judicial approval. The question of the scope of the search and seizure once the police are on the premise would appear to be subsidiary to the basic issue of when the intrusion is permissible. But the law has not developed in this fashion.

Id. at 477. Thus, *Mincey v. Arizona* only clarified

[3]*See, Coolidge v. New Hampshire, supra* at 454, footnotes 5-8 and *Vale v. Louisiana*, 399 U.S. 30 (1970).

whether a search at a homicide scene could be classified as an exigent circumstance and, therefore, did not announce a new principle in criminal law.[4]

III.

PETITIONER'S HANDWRITING SAMPLES WERE PROPERLY ADMITTED INTO EVIDENCE IN THIS CASE.

A. Petitioner's Arrest was Legal and Thus, the Handwriting Samples Were Appropriately Admitted Into Evidence.

As stated earlier, the record is unclear as to exactly when Petitioner was placed under arrest. It does reflect, however, that Petitioner voluntarily went to the police station to answer some questions. At whatever point Petitioner was placed under arrest, it was legal. Article 14.03 of the Texas Code of Criminal Procedure states that an officer can arrest a person found in suspicious places and under circumstances which reasonably show that the person has "been guilty of some felony or breach of the peace . . ." without a warrant.[5] In this case, once the police officer read the notes inside the binder seized at Petitioner's apartment on April 9, 1976, there would have been reasonable grounds to suspect that Petitioner was guilty of a felony offense because the binder contained a story which was written by Petitioner in such a fashion that the words used and the facts provided were similar to the circumstances surrounding the death of Petitioner's daughter. Therefore, the arrest of the Petitioner would have been warranted under the Texas statute. It follows

[4]*See, United States v. Jones*, 597 F.2d 485 (5th Cir. 1979), in which the Fifth Circuit held *Mincey v. Arizona* and *Michigan v. Tyler* should not be applied retroactively based on the facts of the case.

[5]*See*, page 2, herein.

that the handwriting exemplars were admissible provided that they were legally obtained. Since Petitioner voluntarily agreed to write the samples, they were properly admitted into evidence.

However, the question is raised by Petitioner that there was an unreasonable delay in taking her before a magistrate. Assuming *arguendo* that there was an unreasonable delay, the Fifth Circuit and Texas Courts have held that an unreasonable delay will only render the evidence inadmissible upon a showing of some causal connection between the delay and the evidence gathered. *See, e.g., Maloy v. State*, 582 S.W.2d 125 (Tex. Crim.App. 1979); *Myre v. State*, 545 S.W.2d 820 (Tex. Crim.App. 1977); *Whitaker v. Estelle*, 509 F.2d 194 (5th Cir.), *cert. denied*, 423 U.S. 872 (1975). Petitioner has failed to show any causal connection between the delay and the taking of the handwriting samples.

B. Assuming *Arguendo* that the Detention or Arrest was Illegal, Petitioner has Failed to Establish a Connection Between the Arrest and the Taking of the Handwriting Samples.

Petitioner argues that the handwriting exemplars were inadmissible evidence because they were the fruits of an illegal arrest, and she cites for authority *Davis v. Mississippi*, 394 U.S. 721 (1969) and *Brown v. Illinois*, 422 U.S. 590 (1975). These two cases are distinguishable from the facts in this case. In *Davis v. Mississippi*, the petitioner was not only subjected to fingerprinting but he went through extensive interrogation during the illegal arrest. This Court emphasized these circumstances in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248, 2258 (1979). Here there is no evidence that Petitioner was subjected to interrogation. Further, *Brown v. Illinois* is distinguishable because of the clear illegal search that occurred after the arrest there. There is no flagrant official misconduct in this case. The warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966) were administered by an officer before asking the Petitioner if she would provide them with handwriting samples. To reiterate the facts in this case, Petitioner was allowed to visit with friends and possibly even with family, and she voluntarily decided to provide handwriting samples. The record does not reflect any interrogation during her four day stay at the jail. Thus, the handwriting samples were obtained legally since Petitioner has failed to show any causal connection between the arrest and the taking of the handwriting samples.

Moreover, *Brown v. Illinois* and *Davis v. Mississippi* are further distinguishable because they dealt with the taking of a confession and fingerprints, respectively. In *Gilbert v. State of California*, 388 U.S. 263 (1967), this Court noted that:

> If, for some reason, an unrepresentative [handwriting] exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis, in comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [state's] case at trial through the ordinary processes of cross-examination of the [state's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts."

Id. at 267. For this reason, handwriting samples should be treated differently from fingerprints and confessions because it is much easier for a defendant to challenge them at the trial. In this case, Petitioner had a handwriting expert testify on her behalf and thus had the opportunity to challenge her handwriting samples as well as the other handwritten evidence. It should also

be noted that Petitioner could have easily been compelled to provide handwriting samples at the trial since "[c]ompulsion of handwriting exemplars is neither a search or seizure subject of the Fourth Amendment protections, . . . nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination." *See, United States v. Euge*, ____ U.S. ____, 48 U.S.L.W. 4184, 4186, No. 78-1453 (U.S. Feb. 20, 1980). Petitioner's argument therefore must fail for any one or all of the reasons set forth above.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of her contentions are needed and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of this Court, hereby certify that three copies of the above Brief in Opposition have been served by placing same in the United States Mail, postage prepaid, certified, on this the ____ day of March, 1980, addressed to: Stephen E. Van Gaasbeck, 1227 S.W. Military Drive, San Antonio, Texas 78221.

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